85-192 (1)

Supreme Court, U.S.
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No.

In The Supreme Court of the United States

October Term, 1984

CIRO AUTORINO,

Petitioner,

vs.

SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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50 pp

QUESTIONS PRESENTED

1. Is a conviction for larceny by embezzlement supported by sufficient evidence to satisfy the requirements of due process of law secured by the Fourteenth Amendment, where all of the testimony in support of a necessary ingredient to the crime constitutes hearsay declarations made by the deceased victim?

2. Was Petitioner's Sixth Amendment right to confrontation and cross-examination deprived, where the prosecution depended to a significant degree upon the declarations of the deceased victim of the crime, which were not uttered under circumstances giving them a sense of reliability?

3. Does the Fourteenth Amendment guarantee of due process of law require a State prosecutor as a per se rule to supply the identity of the alleged accomplices of a defendant in a criminal case?

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SUPREME COURT OF THE UNITD STATES
OCTOBER TERM, 1984

CIRO AUTORINO,

Petitioner,

-against-

SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND JUDGMENT BELOW

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit is taken from the Order of the United States Court of Appeals for the Second Circuit filed the 6th day of June, 1985, affirming the Order dated March 5, 1985 of the United States District Court for the Eastern District of New York (Sifton, J.) denying the Petition for a Writ of Habeas Corpus to relieve Petitioner from his detention under color of a judgment of conviction entered on the 26th day of August, 1981 in Kings County Supreme Court, sentencing Petitioner to concurrent terms of five to fifteen years plus a Four Hundred Thousand ($400,000.00) Dollar fine on various counts of Forgery in the First Degree, Forgery in the Second Degree, Grand Larceny in the Second Degree and Conspiracy in the Second and Third Degrees, after trial by jury, which judgment was affirmed by the Appellate Division, Second Department and leave to further appeal to the New York Court of Appeals having been denied.

JURISDICTION

Jurisdiction is hereby invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This appeal brings up a question of construction of the Sixth and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

The factual background of this case is detailed with precision in the exhaustive opinion of Judge Charles P. Sifton of the United States District Court for the Eastern District of New York. However, summarizing the essential facts, this case had its genesis in an alleged discovery made by the attorneys for the Estate of Frederick Lundy after his death, that certain bonds, stock dividend checks, executor commissions and real property had been negotiated during his lifetime. The State set out to prove that these instruments had been taken without his consent from the deceased's home by a trusted employer, the Petitioner herein. The State relied upon hearsay declarations made by Lundy during his lifetime and reported by various witnesses to establish that he had no intention of parting with his property and that he had complained that certain bonds, stocks and checks were missing. It should be noted that Lundy died without any immediate family and, therefore, there was no natural subject of his bounty.

Two alleged accomplices, Mario Caliari and John Ladone, testified in a manner contradicting a deposition that had been given by Petitioner in the Civil Estate matter but did not give any testimony that incriminated Peti-

tioner. Indeed, both witnesses testified to suspicious circumstances. Caliari testified that Petitioner had delivered certain securities to him at an airport and Ladone testified that at Petitioner's request, he notarized Lundy's signature on certain deeds. It was also established that Caliari and co-defendants, Coursen and Ramaglia, had opened bank accounts for the purpose of negotiating various stocks and bonds of Lundy that came into their possession.

During the course of the trial, the prosecution sought to use another witness, Marcello Stellato. However, when it became necessary to disclose certain statements made by Stellato, which included the identification of two other persons, Kasselakis and Sanitori as alleged accomplices of Petitioner, the prosecution elected not to use Stellato as a witness and concealed the evidence that Kasselakis and Sanitori were alleged accomplices. Thus, Petitioner was compelled to proceed to trial without disclosure of the identity of the people with whom he allegedly conspired to allegedly steal and deliver securities from his employer.

REASONS WHY A WRIT SHOULD BE GRANTED

There are essentially three (3) important reasons why the Writ of Certiorari should be granted. It presents three (3) important questions of law that have far reaching interest and that call for clarification.

ONE

In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court wrote that a State conviction without evidence beyond a reasonable doubt violates due process of law. In the case at bar, the evidence against Petitioner did not meet the Constitutional requirement. It consisted

of highly speculative hearsay from which a jury was to infer that Frederick Lundy did not consent to the transactions that the State has characterized as embezzlement. The only evidence of non-consent were alleged declarations made by Lundy prior to his death to friends and distant relatives that he suspected Petitioner of wrongdoing, that he was missing various securities and that the state of his mind was not to dispose of these securities. Other than these declarations, there was not a scintilla of evidence that Lundy did not consent to any transfer made of his securities. As pointed out, Lundy died without any immediate heirs. Therefore, no natural subject of his bounty was deprived. Indeed, it would seem that Petitioner, who was a trusted man-servant for Lundy for some fourteen (14) years, would be more likely a subject for reward, rather than distant relatives that Lundy hardly knew. Therefore, what the prosecution did in this case was to offer hearsay evidence to speculate that these securities were taken without consent, which was a necessary ingredient to the embezzlement charge. The Supreme Court should amplify upon *Jackson* by ruling that speculation and surmise cannot be used to support a State conviction, where the evidence must point to guilt beyond a reasonable doubt.

TWO

The second issue to be explored by the Supreme Court are the tests for reliability in allowing the use of hearsay evidence in a State Court Trial, so as not to conflict with the safeguards of confrontation and cross-examination secured by the Sixth Amendment. In *Ohio v. Roberts,* 448 U.S. 56 (1980), the Supreme Court, in reconciling the use of hearsay evidence balanced exceptions to the rule against hearsay, with the Sixth Amendment right to confrontation and cross-examination, and adopted a two step approach

to determine whether the right of confrontation is violated. The first step is easily resolved. The Supreme Court held that evidence must be presented that the declarant was available for cross-examination. The death of Lundy satisfies this initial requirement. The second requirement is that the declaration must possess adequate indicia to reliability. The Supreme Court has often held that traditional exceptions to the rule against hearsay, including dying declarations and res gestae statements meet such requirement because of the reliability of the declarant at an excited moment in his life. In the case at bar, there was not a scintilla of reliability in the declarations attributed to Lundy, since they constituted little more than gossip and idle conversation with the witnesses, at an insignificant time of his life. The declarations that he did not trust Petitioner, that he would not wish to sell his real property and that some of his securities and checks were missing were made under the calm of gossip and small talk. If ever there were indicia of non-reliability, it was to these declarations, since they were not made at any excited time in his life. Thus, the Supreme Court should use this case as a vehicle to discuss the second prong of the *Ohio v. Roberts* Rule concerning the reliability of the use of hearsay to reconcile it with Sixth Amendment safeguards.

THREE

The State deliberately concealed from the defense, the identity of two alleged accomplices of Petitioner. Indeed, it was alleged that these were the two accomplices that Petitioner used as a go-between to get the bulk of the securities to co-defendants who set up bank accounts. This Court has made many pronouncements concerning the obligation of the State to disclose information. *Giles v. Maryland,* 386 U.S. 66 (1966). It must be stressed that a demand for disclosure should not be required, where the

defense has no idea that information is in possession of the State. In the case at bar, at a Chambers conference, defense counsel were not permitted to remain. Only after the trial was over, did the record reflect that the information that the State refused to disclose was the identity of two alleged accomplices of Petitioner. It is strongly urged that this Court use this case as a vehicle to adopt a per se rule requiring disclosure in a criminal case of the alleged accomplices of the defendant. The Federal Courts have interpreted Rule 16 of the Federal Rules of Criminal Procedure to require such disclosure. It is respectfully submitted that the issue of prejudice has no play in respect to the type of disclosure that bears on the sufficiency of the notice afforded a defendant in a criminal case of the nature and cause for the accusation. Disclosure can never be adequate where a defendant is kept in the dark concerning his alleged accomplices. This case will provide the necessary vehicle for the Court to set forth the suggested per se rule.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of June, one thousand nine hundred and eighty-five.

Present:
HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,

HONORABLE JON O. NEWMAN,
Circuit Judges.

CIRO AUTORINO,
Petitioner-Appellant,

-against-

Superintendent, Arthur Kill Correctional Facility,
Respondent-Appellee.

85-2101

UNITED STATES COURT OF APPEALS
FILED
JUN 06 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons stated int he thorough Memorandum and Order of Judge Sifton dated March 5, 1985.

s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

s/ Thomas J. Meskill
THOMAS J. MESKILL

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judges.

APPENDIX B—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
Melvin M. Lebetkin, on behalf of
CIRO AUTORINO,

Petitioner

-against-

SUPERINTENDENT OF ARTHUR KILL
CORRECTIONAL FACILITY,

Respondent.

----------x

SIFTON, District Judge.

Petitioner, currently an inmate at Arthur Kill Correctional Facility, petitions for relief pursuant to 28 U.S.C. §2254 from a sentence imposed by the State of New York on August 26, 1981, after a jury trial in which petitioner was found guilty of forgery in the first degree (4 counts), forgery in the second degree (7 counts), grand larceny in the second degree (11 counts), and conspiracy in the second and third degrees in connection with his participation in a conspiracy to steal stocks, bonds, checks, and deeds from his employer, Frederick Lundy. Petitioner was sentenced to five to fifteen years imprisonment; a fine of

$400,000 was also imposed. The Appellate Division, Second Department, affirmed the conviction and denied leave to appeal to the New York Court of Appeals.

Petitioner seeks a writ of habeas corpus on three grounds, all of which were raised on his appeal from his conviction: (1) that petitioner's fourteenth amendment rights were violated because his conviction was not supported by evidence sufficient to sustain a verdict of guilty beyond a reasonable doubt, (2) that his sixth amendment right of confrontation was violated by the use of out-of-court declarations made by Lundy to prove an essential element of the crimes charged, and (3) that petitioner's right to due process of law was violated by the prosecution's failure to disclose to petitioner allegedly exculpatory material.

Upon review of the record of petitioner's state court conviction and subsequent appeal, I conclude that the petition must be denied for the reasons set forth below.

DUE PROCESS

Petitioner's argument that he was denied due process because his guilt was not proven beyond a reasonable doubt is based on his contention that he was convicted without evidence of at least one of the essential elements of each of the crimes with which he was charged. In particular, petitioner claims that the prosecution did not prove that Lundy did not consent to the removal of his assets. Further, petitioner alleges that the prosecution failed to prove that the assets were removed by petitioner.

Petitioner was tried jointly with co-defendants Joseph Ramaglia and Eric Coursen in connection with the theft of stocks, certificates, checks, bonds, and deeds belonging to

Frederick Lundy. Lundy, petitioner's employer, died in 1977 at age 80, having accumulated between $15 and $20 million dollars in assets. After Lundy's death, David Green, Lundy's attorney, discovered that a substantial portion of Lundy's assets were in the possession of Mario Caliari, Coursen, Ramaglia, and a Caliari/Coursen-owned trust company called Cruz del Sur, persons and entities with whom Lundy allegedly had no connection. At trial, it was shown that Caliari, Coursen, and Ramaglia had obtained the assets and deposited them into accounts Ramaglia had opened in Lundy's name, posing as Lundy, with Caliari having power of attorney, in the Roundout National Bank and the Roundout Savings Bank in Kingston, New York. The prosecution argued that Caliari, Coursen, and Ramaglia obtained Lundy's securities without Lundy's consent from petitioner, who was Lundy's chauffeur and handyman for thirteen years and who was one of a very limited number of people with access to Lundy. Petitioner contended that Lundy consented to the transfer and that petitioner was simply obeying Lundy's instruction when he delivered certain instruments to Caliari. Petitioner also contended that he did not deliver all the assets in question. In his application for a writ, petitioner alleges that the prosecution did not satisfy its burden of proving beyond a reasonable doubt that petitioner's version of the facts was false or that petitioner was guilty of forgery, grand larceny, or conspiracy.

If a petitioner contends in an application for a writ of habeas corpus that his conviction is based on insufficient evidence, the court has a duty to assess the facts presented at trial and determine whether the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt. The court is not required to determine whether it believes that the evidence at trial established petitioner's guilt beyond a reasonable doubt. Rather, it

must determine whether, when all the evidence is viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 318-19 (1979); *see also Woodby v. INS,* 385 U.S. 276, 282 (1966). This Court must presume that the state court afforded petitioner a fair trial as well as adequate post-conviction remedies to address possible error. Under the federal habeas corpus statute, it is incumbent on petitioner to refute this presumption, *Jackson,* 443 U.S. 323.

However, although the conviction is presumptively valid, this Court has a duty to overturn the conviction in whole or in part where evidence was insufficient to support a guilty verdict in any of the counts on which petitioner was convicted. Accordingly, this Court must determine whether, based on the evidence in the record, any rational trier of fact could have convicted petitioner of:

(1) Grand larceny in the second degree of a $7,560 Nabisco check dated July 8, 1977.

(2) Forgery in the second degree of 21 real estate deeds transferring property from Frederick Lundy to Cruz del Sur, all dated August 16, 1977.

(3) Grand larceny in the second degree and forgery in the first degree with respect to a 2,000 share Standard Brands stock certificate dated May 17, 1966.

(4) Grand larceny in the second degree and forgery in the first degree with respect to a 4,000 share Standard Brands stock certificate dated September 20, 1975.

(5) Grand larceny in the second degree and forgery in the first degree with respect to a 1,006 share LILCO stock certificate dated August 13, 1976.

(6) Grand larceny in the second degree and forgery in the first degree with respect to fifty-one $5,000 U.S. Savings Bonds.

(7) Grand larceny in the second degree and forgery in the second degree with respect to a Central Hudson Gas & Electric dividend check dated February 1, 1977, in the amount of $4,669.80.

(8) Grand larceny in the second degree and forgery in the second degree with respect to a Central Hudson Gas & Electric dividend check dated August 1, 1977, in the amount of $4,887.

(9) Grand larceny in the second degree and forgery in the second degree with respect to a LILCO dividend check dated March 1, 1977, in the amount of $3,279.56.

(10) Grand larceny in the second degree and forgery in the second degree with respect to a $10,717.78 Manufacturer's Hanover Trust Co. check dated May 16, 1977.

(11) Grand larceny in the second degree and forgery in the second degree with respect to a $15,600 New York City Finance Administration check dated July 15, 1977.

(12) Grand larceny in the seond degree and forgery in the second degree with respect to a $9,497.04 executor's commisssion check dated August 25, 1977.

(13) Conspiracy in the second degree to commit felonies of forgery in the first degree.

(14) Conspiracy in the third degree to commit felonies of grand larceny in the second degree and forgery in the second degree.

In order to sustain each of the eleven second-degree grand larceny convictions described above, this Court must find that, based on the evidence on the record, a rational trier of fact could have concluded that petitioner wrongfully took, obtained or withheld each of the financial instruments described above with the intent to deprive Lundy of his property, NYPL §155.05, and that the value of each instrument exceeded $1,500, NYPL §§155.05(2)(a) and 155.35. This requires that there be sufficient evidence on the record to prove each of the following five elements beyond a reasonable doubt: (1) Petitioner stole each instrument; (2) petitioner stole each instrument with the intent to deprive Lundy of the property; (3) petitioner stole the property from Lundy, and Lundy was the owner of the property stolen, in the sense of having a superior claim to petitioner's; (4) petitioner did not have Lundy's consent to obtain such property and (5) each instrument was worth more than $1,500. Petitioner contends that the prosecution did not prove the first or fourth elements of this offense beyond a reasonable doubt with respect to any of the instruments.

In order to convict petitioner of first-degree forgery, the prosecution had to prove four elements beyond a reasonable doubt: (1) that petitioner, either himself or as an aider or abettor, made, completed or altered a written instrument, (2) that the written instrument was or purported to be or to represent, if completed, part of an issue of government bonds, or of stock "other instruments

representing interests in or claims against a corporate or other organization of its property," NYPL §170/15(1) and (2), and (3) that petitioner acted without the authority of anyone entitled to grant it, and (4) that petitioner acted with intent to defraud or injure Lundy, NYPL §170.15. For second-degree forgery, the elements are the same as those needed to establish first-degree forgery, except that in second-degree forgery the written instrument in question must be or must purport to be a deed, codicil, commercial instrument or other instrument which does or may evidence, create, transfer or terminate or otherwise affect a legal right, interest, obligation or status, NYPL §170.10.

As in the grand larceny convictions, petitioner contends with respect to the forgery convictions that the prosecution did not prove that Lundy did not either sign his name or consent to having it signed by another that there is insufficient evidence to link petitioner to the offenses as an aider and abettor.

The prosecution sought to establish petitioner's guilt principally by introducing evidence to establish petitioner's complicity in a conspiracy to steal and forge the financial instruments and deeds in question from Lundy. The prosecution introduced depositions of petitioner to link petitioner to the conspiracy and then introduced testimony of two alleged co-conspirators, Caliari and Ladone, to show that petitioner's version of the nature of his connection to the events at issue was false.

Petitioner's version of the events was that he met Caliari in an Italian record store and presented Caliari's card to Lundy. Petitioner claimed that Lundy and Caliari thereafter met in Lundy's apartment to discuss a business deal and that Lundy later received a letter from Caliari. Petitioner stated that several months after Caliari and

Lundy's meeting, Lundy gave petitioner a pillowcase full of documents to deliver to Caliari at Kennedy Airport. In addition, petitioner testified in his deposition that he was present in Lundy's apartment with Ladone when Lundy was signing documents similar to the 21 deeds described above, that Lundy asked petitioner to sign the documents as a witness, and that that petitioner complied with Lundy's request.

Petitioner's version of the events and cirsumstances surrounding the transfer of the financial instruments and deeds to the Caliari group was refuted at trial by the testimony of Caliari and Ladone.[1] Caliari and Ladone each testified that they each met petitioner several times, separately, in 1977 and concocted over stories to explain how Lundy's assets came into Caliari's, Coursen's, and Ramaglia's possession and to explain the events surrounding the transfer of Lundy's property to the Caliari group. Caliari testified that he and petitioner developed the story that petitioner testified to and that they also made up the story about Caliari sending Lundy a letter and about petitioner delivering documents to Caliari at Kennedy Airport. Caliari further testified that he himself gave petitioner a letter to place in Lundy's apartment which was intended to establish a prior business connection between himself and Lundy.[2] Caliari testified that he never met Lundy or had any business dealings with him.

Ladone testified that petitioner told him to tell law enforcement officials that petitioner and Ladone had been in Lundy's apartment when Lundy signed the 21 deeds transferring the real estate to the Caliari group. Ladone stated that he had, in fact, notarized the deeds, but not in Lundy's presence. He further testified that he did not meet petitioner until after the deeds were notarized.

The prosecution buttressed the testimony of Caliari and Ladone with testimony of Lundy's business associates and relatives to the effect that they knew of no transfer by Lundy of his assets to the Caliari group and that Lundy was not likely to have consented to the transfer at the time in question and in the manner in which petitioner alleged the transaction occurred. (The testimony of these persons, including their statements with respect to statements of Lundy, form the basis of petitioner's second ground for seeking issuance of the writ.)

Walter Lundy, a nephew, testified that he lived with Frederick Lundy in the latter's apartment at this uncle's request. Walter stated that Lundy was confined to a wheelchair after breaking his hip in 1976 and because of his condition did not leave the upstairs apartment. Walter testified further that he and petitioner were virtually the only people to see Frederick Lundy and were the only people with access to his private office. According to Walter Lundy, petitioner was one of the persons who brought Lundy his mail. He also testified that his uncle sent him to the bank with a power of attorney, but that it was valid only for one day and was not the kind of general power of attorney that petitioner claimed Frederick Lundy gave Caliari. Walter Lundy also testified that his uncle had told him that various stock certificates and bonds were missing. In addition, Walter Lundy testified to a statement by his uncle to the effect that he would not sell real estate. Finally, Walter Lundy testified that his uncle never mentioned Caliari, Ramaglia, Coursen, Roundout National Bank, Roundout Savings Bank or Cruz del Sur.

Walter Lundy's testimony was corroborated in part by the testimony of other friends and associates of Frederick Lundy. These witnesses, including Frederick Lundy's accountant and his attorney, described Lundy as

a solitary man who trusted few people. Each of the other witnesses said they had never been in Lundy's private office, and noted that Lundy conducted much of his business by telephone. Several witnesses testified that Lundy's powers of attorney were limited in duration to a single day. None of the witnesses, including Lundy's attorney, had ever heard Lundy mention Caliari, Coursen, Ramaglia, Roundout National Bank, Roundout Savings Bank or Cruz del Sur. Several witnesses testified that he told them that he was missing checks, bonds and stock certificates.

The evidence with respect to the specific assets alleged to have been stolen and forged was as follows:

Executor's Commission Check. Petitioner was convicted of second-degree grand larceny and second-degree forgery of this check. The evidence at trial established that this check was negotiated at the Roundout National Bank. A handwriting expert attributed the Lundy signature to Ramaglia. The prosecution introduced the following evidence indicating that petitioner took this check and that he did so without Lundy's consent. Lundy's attorney, Mr. Green, testified that on September 1, 1977, he delivered four checks, all of which required Lundy's signature as a co-executor of a relative's estate to an associate of Lundy named Doll. The $9,497 check to Lundy, which was Lundy's fee for being co-executor, was among these checks. Green testified that after he gave the checks to Doll he spoke with Lundy on the telephone, instructing him where to sign the checks. Green stated that when the envelope was returned to him, there were only three checks in it; the $9,497 check was missing. Green testified that he called Lundy just prior to the latter's death to ask him if he had the check. Lundy told Green to call Doll to see if Doll had the check.

Doll testified that he gave the four checks to petitioner on September 1, 1977, to give to Lundy. Doll stated that the envelope was returned to him later that day to mail to Green, which he did.

Mingione, a Lundy employee since 1959 and Lundy's bookkeeper for the last 4-5 years, testified that Lundy asked him about the $9,497 check a few days before Lundy died, adding that Lundy said it was misssing. Mingione told him he did not have the check.

Marion Anderson, a close personal friend of Lundy's testified that just before Lundy died he told her that he was missing a large check which Mr. Green had delivered to him.

A rational trier of fact could conclude, based on this evidence, that petitioner removed this check from Lundy without Lundy's consent and with intent to deprive Lundy of the property. Since the check was worth more than $1,500, a jury could have concluded that petitioner's guilt of second-degree grand larceny was established beyond a reasonable doubt.

Twenty-One Real Estate Deeds. Petitioner was convicted of second-degree forgery with respect to the 21 deeds to Lundy's property which were transferred to Cruz del Sur. These deeds were signed by petitioner, who contended that he signed them in Lundy's and Ladone's presence after Lundy himself signed the deeds. As already noted, petitioner's version of the facts was refuted at trial by Ladone, who testified that, while he notarized the deeds, he did not notarize them in Lundy's or petitioner's presence. Ladone stated that he did not meet petitioner until after he notarized the deeds. He added that, when he met petitioner, petitioner told him that, if questioned, he

should tell law enforcement officials that he notarized the deeds in Lundy's presence in Lundy's apartment and that petitioner told Ladone on another occasion that, if Ladone had to come to court, petitioner would give him $5,000 for his expenses.

Testimony of the handwriting expert established that Lundy did not sign the deeds and that a member of the conspiracy signed the deed. The prosecution established that the deeds were altered without consent and with intent to defraud by introducing evidence that the property was transferred to the Caliari group and that this was done without consent. The prosecution proved lack of consent by showing Lundy had no intention of disposing of his property at that time. Walter Lundy testified that Lundy told him he did not intend to sell his eal estate and, in fact, wanted to buy more. Frank Eck, caretaker for 48 years of the Lundy property in upstate Warwarsing, testified that he spoke with Lundy often by telephone and that Lundy never mentioned disposing of the Warwarsing estate or letting Eck go. Eck said he spoke to Lundy the Sunday before Lundy died and that Lundy asked him about the estate and about how construction was proceeding on a barn. Eck said that earlier that summer Lundy mentioned he was interested in buying some property adjoining the Warwarsing estate, but told Eck that the deal had fallen through. Lundy also discussed with Eck fixing up some cottages on the property so he could rent them and putting up new "No Trespassing" signs on the property.

Ms. Anderson testified that Lundy never mentioned taking his property away from his heirs and that he had specifically said he would not sell his Brooklyn properties. She testified further that Lundy told her that he wanted to buy more property upstate. She testified that Lundy kept his deeds in a file in his office, where, according to Ander-

son and Walter Lundy, only Walter and petitioner were allowed to enter. Doll testified that Lundy told him he wanted to rent his property, not sell it.

Petitioner contends that the above testimony is refuted by the testimony of Patrick MacKay, a member of Greens' law firm, who stated that Lundy told him in the spring of 1977 that, although he, Lundy, did not want to sell his property at that time, he did want to sell all his property at some point. However, MacKay's testimony did not establish that Lundy consented to the transfer of the property to the Caliari group. Reasonable people, weighing the evidence presented, could have concluded beyond a reasonable doubt that Lundy did not consent to the transfer of his property, that his signature was falsely placed on the deeds with intent to defraud, and that petitioner was responsible either as a principal or aider and abettor of second-degree forgery.

Standard Brands & LILCO Stock Certificates. Petitioner was convicted of second degree grand larceny and first degree forgery of two Standard Brands stock certificates and one LILCO stock certificate. All the elements of both crimes are conceded to have been established except whether (1) petitioner was the person who took the certificates and (2) Lundy signed the certificates transferring the certificates to the Caliari group or whether Lundy consented to another person signing for him.

At trial the prosecution introduced the testimony of the handwriting expert to establish that Lundy did not sign any of the certificates and that his signature was forged, possibly by Ramaglia. The handwriting expert's testimony was corroborated by Ramaglia, who testified that he signed two or three of the stock certificates. The prosecution established that Lundy did not consent to the transfer of

the stock certificates through the testimony of Mingione, a long-time Lundy employee, Walter Lundy, and Doll, who all testified that Lundy told them he was missing stock certificates and wanted them to find them.

The prosecution extablished that petitioner stole the check by showing that the certificates came into possession of the Caliari conspiracy, that petitioner was connected with the conspiracy, and that petitioner was one of a limited number of persons sufficiently close to Lundy to be able to obtain these certificates.

Fifty-One $5,000 U.S. Savings Bonds. Petitioner was convicted of grand larceny in the second degree and forgery in the first degree with respect to these bonds. The prosecution established through a handwriting expert that the signature on the bonds, which were deposited in the account that the conspirators opened in Lundy's name at Roundout Savings Bank, was not Lundy's and was probably Ramaglia's. Again, petitioner contends that the proseuction did not establish that Lundy did not consent to the transfer or that petitioner was the person who stole the bonds. All the other elements of the above crimes were clearly established.

At trial, the prosecution did not introduce direct evidence with respect to these subjects apart from testimony of Walter Lundy and Marion Anderson that Lundy told them that he was missing some bonds. Whether the prosecution established that petitioner was the person who stole the bonds and that Frederick Lundy did not consent to there transfer depends accordingly on an evaluation of petitioner's role in the overall conspiracy and its general objectives.

Nabisco Dividend Check ($7,560). Petitioner was convicted of grand larceny of this instrument. It is undisputed

that Lundy was the owner of the instrument and that the instrument is worth more than $1,500. Petitioner again contends that there was insufficient proof to show that he stole the instrument or that the instrument was taken without consent. At trial it was shown that the Nabisco dividend check was deposited to Ramaglia's bank account at National Bank of North America. The check was endorsed by Lundy and Ramaglia. According to the handwriting expert, Lundy's endorsement on the check was not made by Lundy, but by Ramaglia.

There was no evidence at trial specifically linking petitioner to the theft of this check. However, there was evidence, some of which was presented above, showing that peitioner was one of a few people who had access to Lundy's private apartment. Also, at trial it was shown that petitioner often delivered Lundy's dividend checks to him. Accordingly, the prosecution contended it was reasonable to infer that, since petitioner stole some of the instruments that came into the hands of the conspiracy and since he alone of all the conspirators had access to all of them, he stole each of the instruments that found their way to the Caliari group.

Two Central Hudson & One LILCO Dividend Checks. Petitioner was convicted of second-degree grand larceny and second degree forgery of these three dividend checks. Both Central Hudson checks bore Lundy's purported "signature." However, the handwriting expert testified that Lundy had not signed either check and that there was a "good possibility" Ramaglia signed the checks. One check was deposited into Ramaglia's account and the other was deposited to the Courmas Co., a corporation owned by co-defendant Coursen. The LILCO check was deposited to the Caliari/Lundy account at Roundout National Bank. The handwriting expert

testified that Ramaglia probably was the person who endorsed the LILCO check with Lundy's name.

The prosecution established that Lundy did not consent to the transfer of the checks by showing that Lundy's name was forged on them and by introducing evidence indicating Lundy had no connection with the Caliari group and consequently had no reason to transfer his assets to them. The prosecution established that the petitioner removed these assets from Lundy through testimony connecting petitioner to the conspiracy. In addition, Doll testified that among Doll's duties was to give petitioner Lundy's dividend checks to bring to Lundy. The evidence at trial indicated that petitioner was the only person with access to these assets who also was connected to the conspiracy. The jury could infer beyond a reasonable doubt that petitioner was guilty based on this evidence.

Manufacturer's Hanover & NYC Finance Administration Checks. Petitioner was convicted of second-degree grand larceny and second-degree forgery of these checks. The Manufacturer's Hanover check was deposited in Ramaglia's account in the National Bank of North America. The handwriting expert testified that Ramaglia probably forged the Lundy endorsement on the check. The NYC Finance Administration check was mailed to Lundy at his home. The check was endorsed and deposited to Courmas Co.'s accounts.

The prosecution established that petitioner stole these checks from Lundy by establishing that petitioner had access to these checks and by establishing that petitioner was the Caliari group's inside man in the Lundy household.

The evidence recited above was sufficient for a rational trier of fact to conclude beyond a reasonable doubt

that Lundy did not consent to any of the asset transfers at issue and that petitioner stole each of the assets he was charged with stealing. The prosecution established petitioner's guilt by showing that the Caliari group wrongfully appropriated and forged Lundy's name on each of the assets in question. The prosecution proved that petitioner was a member of the conspiracy and produced substantial evidence to show petitioner stole certain specific assets, in particular the 21 deeds and the $9,497 executor's check. The prosecution then introduced evidence on petitioner's access to Lundy's deeds, dividend checks, stock certificates and bonds. The jury could infer from this evidence that petitioner was the Caliari group's inside man in the Lundy household. Given that petitioner had access to all the instruments and deeds that were stolen, the jury could conclude from the fact that petitioner stole some of the assets that he stole them all.

As to the conspiracy convictions, the prosecution established its case against petitioner if it established beyond a reasonable doubt (1) that two or more of the defendants entered into an agreement to engage in certain acts or course of conduct, (2) that petitioner became a member of the conspiracy, (3) that such acts or course of conduct constituted a crime,[3] and (4) that one or more of the conspirators performed at least one overt act charged in the indictment to further and carry forward the purpose and objectives of the conspiracy. From the evidence recited above, it is clear that a rational juror could have found each element beyond a reasonable doubt.

The prosecution established element two through the evidence presented above that petitioner (and Ramaglia and Coursen) were guilty of multiple counts of first- and second-degree forgery and second-degree grand larceny.

The prosecution established the overt act when it established that petitioner stole the assets from Lundy and when the prosecution established that the conspirators forged Lundy's name on the documents. Consequently, the prosecution established beyond a reasonable doubt that petitioner was guilty of second- and third-degree conspiracy.

CONFRONTATION

Petitioner next raises as a ground for habeas relief the allegedly improper introduction of Lundy's extrajudicial statements to prove petitioner's guilt. Petitioner's theory is that the admission of these statements violated his sixth amendment right of confrontation and that absent the improper admission the prosecution could not have proved its case beyond a reasonable doubt. On the latter point, petitioner argues that the sole evidence of non-consent by Lundy was hearsay statements made to his associates. Petitioner claims that, if these statements had been excluded, the government would not have met its burden of proving beyond a reasonable doubt that Lundy did not consent to the liquidation of his investments.

Petitioner states in his brief that he has not made any effort to pinpoint any specific hearsay statements whose introduction violated his constitutional rights. In fact, his description of these statements deals not with their hearsay character but rather with their content. Petitioner has, in fact, only generally described the allegedly improper statements. Working from petitioner's general description, it appears that petitioner objects to the introduction of (1) testimony by Lundy's employees that Lundy told them that he suspected that securities and checks were being pilfered, (2) testimony by Lundy's employees that Lundy told them that he would never sell his real property,

(3) testimony by Lundy's attorney relating Lundy's statements that he wished to personally participate in his business transactions, and (4) testimony by Marion Anderson repeating Lundy's statements that petitioner was Italian and could not be trusted.

The Supreme Court in *Ohio v. Roberts,* 448 U.S. 56 (1980), adopted a two-step approach to determine whether the right of confrontation is violated by the admission of a hearsay declaration: first, the hearsay declarant must be unavailable; second, the declaration itself must possess "adequate indicia of reliability. Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 65-66.

Because no party disputes the fact that the person whose out-of-court declarations are at issue, Frederick Lundy, was unavailable, the issue is whether the statements admitted fell within a hearsay exception or were otherwise sufficiently trustworthy or reliable.

Most of the testimony complained of was admitted by the trial court under the "state-of-mind" exception to the hearsay rule. *See* Federal Rule of Evidence 603(3). "Briefly stated, the state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant at that time if that is at issue in the case.... It allows such statements to show a future intent of the declarant to perform an act if the occurrence of that act is at issue." *United States v. Brown,* 490 F.2d 758, 762 (D.C. Cir. 1974); *Mutual Life Insurance Co. v. Millman,* 145 U.S. 285 (1892); *see also United States v. Cicale,* 691 F.2d 95, 103 (2d Cir. 1982). Further-

more, respondents contend that all the statements are trustworthy and reliable because they were made well in advance of any litigation in the context of ordinary business or personal dealings and were, for the most part, corroborated by other witnesses.

Since the hearsay character of out-of-court declarations is best viewed in the particular, it appears appropriate to focus on the testimony at issue to the extent petitioner has identified it. Petitioner claims that Patrick MacKay, a licensed real estate broker on Long Island, was improperly permitted to testify to conversations he had with Lundy about the sale of property as follows:

> Q. You stated that you also had listings of properties. Could you tell us how many properties this individual [Frederick Lundy] who you spoke to on that telephone listed with your firm during that period of time?
>
> A. He had listed the Lattingtown property; he had listed what was known as the Emerson property on Cedar Swamp Road. He mentioned that he wanted to sell the Wellington property in the Village of Mettinicock. There was a price given to us on the Emerson property, it was $3,180,000. There was no price put on the Wellington property. He did not list what was known as the Phantom House for sale with us.
>
> Q. Did you discuss that with him, though?
>
> A. He said he didn't want to sell it at this time, but he wanted to sell all his properties at some point.

Admission of this testimony was proper as within the state of mind exception to the prohibition against hearsay since it set forth the declarant's then existing intent or plan as to future acts. *See* Weinstein's Evidence ¶803(3)[4] at 803-102. *See Alton Box Board Co. v. Goldman Sachs & Co.*, 418 F. Supp. 1149, 1156 (E.D. Mo. 1976). Moreover,

the statements also possess the required indicia of reliability since, as Mr. MacKay testified, the brokerage agreement and listing cards corroborating Lundy's statement of plan or intent concerning the listing of some but not all of his property were documents kept in the ordinary course of MacKay's brokerage business.

Petitioner next objects to the allegedly improper introduction of the following testimony during direct examination of Jacob Patent, an attorney for Lundy:

> Q. At the time that this will was made did you discuss setting up a trust with Mr. Lundy?
>
> A. No.

The first answer to the objection was that the contents of the discussion with Lundy were not offered as an assertion of the truth of any proposition except, perhaps, of Lundy's then existing intent not to set up a trust in favor of petitioner and his co-conspirators. As such, it is either not hearsay or within the state of mind exception to the hearsay rule. In all events, the statement had indicia of reliability. Lundy had no self-interest in stating that he had no intent to set up a trust for petitioner or the other co-conspirators. The statement that he had no such intent was corroborated by the fact that no documents were found setting up such a trust or conveying Lundy's assets to defendants.

Petitioner further argues that the following testimony of George Higgins, Lundy's nephew, that Lundy never asked anyone to sign his name, violates the confrontation clause.

> Q. Throughout negotiations with your uncle, do you ever recall Mr. Lundy telling you that you can write the name

Frederick William Irving Lundy on any document?

A. No.

Q. Do you ever recall him saying that to any employee in your presence?

....

A. I never seen my uncle turn over the right to write his name by any one, to any one.

Again, Mr. Higgins' answer can be viewed as a non-hearsay statement of his observation of Lundy's business practices. In fact, defense counsel only objected ot the question's relevance and thus waived the complaint he now makes. In all events, the only relevant proposition that the out-of-court discussion was designed to prove was Lundy's state of mind with regard to authorizing others to use his signature. As such, it was admissible as an exception to the hearsay rule.

Petitioner next claims that the testimony of Walter Lundy that Frederick Lundy stated he believed he was missing checks and stock certificates, that he did not maintain an account at Roundout National or Savings Banks, or that he did not know various entities and individuals that were instrumental in the crime was improperly admitted. The testimony complained of reads as follows:

Q. And, could you tell us what the sum and substance of that conversation was [with Mr. Lundy]?

....

A. The reason was he received this dividend check and he could not find the security that it belonged to.

Q. Did he ever complain about the actual checks being missing?

A. He did miss checks, yes. He was missing checks and then he told me that he found them.

....

Q. Did you hear him mention in your presence during the last year of his death the name of Roundout Savings Bank in Kingston, New York?

A. No.

Q. How about the Roundout National Bank in Kingston, New York?

A. No.

Q. Did he ever mention an institution or a company by the name of Cruz del Sur Limited?

A. No.

Q. How about a company by the name of TL and M?

A. No.

Q. Did he ever mention a company, in your presence or to your knowledge, the name of Mario Caliari?

A. No.

Q. Did he ever mention the name of Marcello Stellato?

A. No.

Q. Did he ever mention the name of Joseph Ramaglia?

A. No.

Q. Did he at any time in your presence mention the name of Revere Kitchen?

A. No.

Q. Did he ever mention the name of Eric Coursen?

A. No.

Q. Did he ever mention a Courmas Corporation?

A. No.

....

Q. Now, did he, at any time, to the best of your knowledge, Mr. Lundy, ever give yourself or any one else to the best of your knowledge, permission to use and write and sign his own name to any documents?

A. No.

Q. Did he ever give anything to Jerry Mangione, permission to sign any of these business checks with Mr. Lundy's name?

A. No.

....

Q. You testified that he—other than missing stocks, did Mr. Lundy discuss with you any other documents that he was missing during the year prior to his death?

A. Yes. He was missing some bonds. He said—

....

Q. Did he indicate what kind of bonds those were?
A. For one, it was Pennsylvania, Penn Central.

....

Q. Now, during the last year of Mr. Lundy's life, did you have occasion to discuss with him the sale or buying of his real estate, or his real property or real estate?

A. No. As I say, he really didn't discuss his matters with me, but he did say at one occasion that he wasn't selling any, he would never sell anything, he would buy.

In determining whether Lundy's statements that he was missing checks, bonds and other documents are hearsay, it bears noting that the principal issue on which these statements were admitted was not to prove that the documents were stolen, that is, that the statements were not offered to show that Mr. Lundy was telling the truth in saying that he could not find them. Instead, the issue on which the statements were offered was that which petitioner now says could not otherwise be proved, namely, whether Lundy consented to their not being in his possession. Viewed in this light, it is clear that the statements were not hearsay or out-of-court testimony by Lundy, but rather, circumstantial evidence to prove lack of consent. Lundy's complaint that the documents were missing was, in the circumstances, that they unavailable contrary to his wishes.

Similarly, Lundy's failure to mention to a close relative a variety of individuals and institutions with whom it might be inferred he would have mentioned to his associates had he been associated with them in the fashion described by petitioner was not offered as hearsay, but rather as circumstantial evidence of conduct to prove the falsity of petitioner's story. Finally, Lundy's statement "that he wasn't selling any, he would never sell anything, he would buy," seems best characterized as a statement of their existing plan or intent rather than as an historical recitation of past events.

Petitioner next claims that the testimony by Walter Eck, caretaker of the 5,000 acre Lundy estate in Warwarsing, concerning statements made by Lundy to him concerning the estate was hearsay and violated petitioner's sixth amendment right to confrontation. The testimony reads as follows:

> Q. What was the sum and substance of your conversation with Mr. Lundy on the morning of September 4th, 1977?
>
> ....
>
> A. He wanted to know if we had a lawn mower up there on the estate and I said 'no.'
>
> He said they just stole a new one down here off one of the estates. He said, 'Watch the place.' 'They'll steal me blind down here.'
>
> Q. Did you also discuss with im a barn that was on the estate?
>
> ....
>
> A. Yeah. We were building a barn. He asked me what part of the barn we were working into.
>
> Q. Did he at any time tell you to stop working on the barn?
>
> A. No, he didn't.

Q. Did he tell you at that time that you were to look for new employment?

A. No, he didn't.

Q. Did he indicate to you in any way that he had disposed of the estate?

A. No.

....

Q. During the summer of 1977, do you recall having conversations with Mr. Lundy with regard to the buying of property upstate New York?

A. Yes, I do.

Q. And could you tell us what Mr. Lundy said to you during those conversations?

....

A. First, he was going to buy the property and then—

Q. Which properties did he tell you he was going to buy?

A. Way down on the end of the road. People by the name of 'Strassord' owned it

....

Q. And what else did he say about that property during these conversations?

A. He was going to buy it and then he decided he wasn't going to buy it.

Q. Did he tell you why?

A. When he got interested the second time to buy it, he found out that there was more acreage than it was supposed to be. That's what he told me.

A. He offered a hundred thousand dollars for a hundred fifty acres. When he found out it was two hundred and fifty acres he was becoming interested into it again.

....

Q. Now, where did you send these bills to?

A. Wherever. I'd send my bills to him to the restaurant, Ocean and Emmons Avenue.

Q. Now, did he at any time during the last two years indicate to you that you can sign his name to any of those checks or bills?

A. No, he didn't.

....

Q. Did you speak during the last two years of Mr. Lundy's life with him of the paying of the bills by check during your conversations with him?

A. He paid them by check because nobody ever called me up that he didn't or they didn't get paid.

Q. Did he tell you that he did on the telephone during the last two years of his life.

A. Never had no reason to, no, because he always paid it.

....

Q. Did there come a time in August of 1977 when you had a conversation with Mr. Lundy regarding some signs to be put up on the—

....

A. Oh, yeah.

....

Q. Can you tell us what Mr. Lundy said to you during these conversations?

A. Well, I asked him about getting new signs printed to post the property.

Q. What kinds of signs were these?

A. They were paper with no trespassing on it.

Q. Did they contain his name?

A. Yes.

....

Q. And did there come a time when, in fact, you spoke to Mr. Lundy about ordering these signs to be printed?

A. Yes.

Q. What month was that in 1977?

A. I think it was in August. I wouldn't say for sure. I think it was in August.

Q. And, did there come a time when you ordered these signs on his behalf?

A. Yes.

Q. Do you recall from whom you ordered that?

A. Roundout Publishing Company in Ellenville.

Q. And was there a bill submitted to Mr. Lundy?

A. Yes.

Q. For those signs?

A. Yes.

Q. How many signs did you order?

A. Two thousand.

Q. Did you discuss the number of signs with Mr. Lundy before you ordered it?

A. Yeah.

Q. What did he say about ordering these two thousand signs?

....

A. He'd take the two thousand because we got a better price on two thousand other than five hundred, get them cheaper, so he took the two thousand.

Q. Now, did you ever receive those signs from the Roundout Publishing Company?

A. Yes.

Q. Now, during the summer of 1977, did you also have discussions with Mr. Lundy pertaining to certain cottages on his property upstate?

A. Yes.

Q. And, could you tell us what he said to you with regard to these cottages?

....

A. He talked about fixing them up, he wanted to rent them.

Q. How many cottages did he have upstate?

A. Five or six that we got started that he wanted to finish.

Q. Did he indicate that to you?

A. Yes.

A review of the disputed testimony makes clear that the bulk of it deals with statements offered as conduct inconsistent with an intent on the speaker's part to dispose of his property or establishing a manner of handling business affairs inconsistent with petitioner's theory that he asked others to sign documents or checks for him. The one patently hearsay statement to the effect that "they"

stole a lawn mower from Brooklyn and "they'll steal me blind down here" does not appear to have been specifically objected to and, in all events is hardly of sufficient prejudicial effect to merit attention. Finally, Lundy's statements concerning his intentions with regard to the acquisition and disposition of property appear clearly admissible under the state of mind exception previously discussed.

Petitioner also complains of the testimony of Marion Anderson who testified that she acted as a personal representative and associate of Lundy's. The testimony of Ms. Anderson to which defense counsel objected is as follows:

> Q. At that time [1975] did you in fact have a conversation with regard to the location of Mr. Lundy's deeds?
>
> A. Yes.
>
> Q. What if anything did he say to you at that time?
>
> ....
>
> A. .... At the time of the Geracr trial there was a dispute over borderline—he got his deeds out of his file to give to me to bring to court.
>
> Q. Did he say that to you.
>
> A. Yes. I told him that the deed was required, the judge had asked for it and he said to me I will get it out of my file and you can pick it up downstairs which I did.
>
> ....
>
> Q. If his [Lundy's] signature was required what if anything would you do?
>
> A. I would bring the paper to the desk, have it taken upstairs and I would pick it up later.
>
> Q. Mrs. Anderson, are you a notary public?
>
> A. Yes, I am.
>
> Q. Can you tell us when you became a notary public?

A. Approximately in 1976.

Q. At whose request?

A. At Mr. Lundy's request.

Q. Did he tell you why he wanted you to become a notary?

....

A. He said in case he had any papers that had to be notarized I was available and I could notarize them.

Q. Did you in fact ever notarize papers for him during this period of time?

A. No, sir.

Q. Mrs. Anderson, prior to Mr. Lundy's death did you happen to have a conversation with him regarding Mr. Ciro Autorino?

A. Yes, sir, I did.

Q. Do you know when this conversation took place approximately before his death?

A. About a month prior to his death.

Q. Can you tell us what Mr. Lundy said to you at that time about Ciro Autorino?

A. He questioned me whether I trusted him.

Q. What else did he say at that time?

A. He asked me if I trusted Ciro, what I thought of him and I told him that I really didn't know him that well and I said you are with him constantly. You should know.

Q. What was his response to that?

A. And he was kind of leary.

Q. What do you mean? What did he say?

A. Well, his exact words were, 'Well, you know, he's Italian,' and that was one of his pet phrases, but that was one of his remarks.

Anderson's testimony concerning Lundy's statement of his intention to get his deeds "out of his file" is, pro-

perly characterized, not a statement of plan or intent, but rather, some circumstantial evidence as to where Lundy kept records of the type allegedly stolen from him. Lundy's statements of his intentions in asking Ms. Anderson to be a notary was offered to establish his intent or plan. The conversation between Anderson and Lundy with respect to petitioner's trustworthiness also appears an expression of petitioner's feelings about Autorino. The expression "Well, you know, he's Italian" was certainly not offered to prove petitioner's ethnic background. Ms. Anderson's quotation of her own statement to Lundy was specifically objected to and, in any event, appears to have been only introduced as a foundation for Lundy's expression of his state of mind *vis a vis* Autorino.

In all events, violation of the confrontation clause may be deemed harmless. *Klein v. Harris,* 667 F.2d 274 (2d Cir. 1981). Inadmissible evidence that contributes to a defendant's conviction may be harmless if the other competent evidence of guilt is overwhelming. The error must be harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18 (1967); *Kampshoff v. Smith,* 698 F.2d 581 (2d Cir. 1983).

A review of the evidence in this case demonstrates that the error caused by the improper admission of hearsay was harmless. Those few statements improperly admitted were duplicative of other admissible statements which evidenced Lundy's state of mind. Improperly admitted evidence is harmless where it is merely cumulative of admissible evidence. *See Schable v. Florida,* 405 U.S. 27 (1972); *Hendrit v. Smith,* 639 F.2d 113 (2d Cir. 1981). After a thorough review of the evidence, it is clear that "the evidence adduced at trial overwhelmingly established [petitioner's] participation in those crimes," *People v.*

Autorino, 464 N.Y.S.2d at 555, and that, therefore, the errors were harmless beyond a reasonable doubt.

Accordingly, petitioner's application for a writ of habeas corpus on the ground that he was denied a fair trial due to deprivation of his right to confront witnesses under the sixth amendment is denied.

EXCULPATORY INFORMATION

Petitioner next contends that the failure of the prosecution to make disclosure of information as to the identity of other persons involved in the theft of the Lundy securities deprived appellant of due process of law.

At the conclusion of the testimony of co-defendant Ramaglia, the prosecutor expressed his intention of calling Marcello Stellato, an alleged member of the conspiracy whose name had been mentioned during the course of the trial. Prior to calling Stellato, the prosecutor informed the court that he had material which would have to be given to the defense in aid of cross-examination under *People v. Rosario*, 9 N.Y.2d 286 (1961). The prosecutor indicated, however, that he wished to redact this material. The prosecutor asked for an *ex parte* hearing in which to explain his position. At this *ex parte* proceeding, the prosecutor revealed that Stellato, who had pleaded guilty in the case at bar, was in fear of physical retaliation from two other members of the conspiracy, Sanitori and Kasselakis. These two individuals had, according to the prosecutor, allegedly been responsible for other murders. Thus, the prosecutor wished to excise the names of these men from the *Rosario* material and from Stellato's testimony. When the court declined to grant the requested relief as being too restrictive of the defense, the prosecutor decided that he would not call Stellato.

Petitioner argues that he was not informed of the "startling disclosure" made during the *ex parte* proceeding that Stellato would testify that petitioner's "contact people" were Kasselakis, Sanitori and D. Sanitori, who were members of the Carlo Gambino organized crime family. Petitioner contends that the prosecution should have made available to the defense the substance of this testimony, since it would have established that Sanitori and Kasselakis were the persons who allegedly stole the securities that found their way to the Caliari group and not petitioner. Petitioner argues that failure to disclose the Stellato testimony was unconstitutional as it foreclosed an opportunity for petitioner to prove that they and not him stole the securities.

In *Brady v. Maryland,* 373 U.S. 83, 86 (1962), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Supreme Court further explained and defined the *Brady* rule in *United States v. Agurs, 427 U.S. 97 (1975). There, the Court identified three distinct situations to which the Brady* rule might apply:

> (1) those cases in which 'the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have know, of the perjury'; ... (2) defendant has made a pretrial request for specific evidence; ... and (3) those cases in which the defendant has made a request for disclosure of has made only a general request for all exculpatory information...

The principal distinction among the paradigms set out in *Agurs* is the standard that is used to determine whether the undisclosed evidence is material in each instance. Where the prosecution employs perjured testimony ... the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' ... Under the second paradigm ... the undisclosed evidence is considered material if its disclosure 'might have affected the outcome of the trial.' ... In those cases where the defendant has not specifically requested disclosure of the evidence ... the defendant must show that 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'

In this case petitioner made no specific request for information of the sort revealed in the undisclosed testimony. Accordingly, the conviction cannot be set aside unless the omitted evidence creates a reasonable doubt that did not otherwise exist.

Here, petitioner has not made a showing that the information contained in the Stellato testimony would have introduced reasonable doubt that did not otherwise exist. On the contrary, petitioner admits that the Stellato testimony itself would have tied him to the conspiracy involved in the distribution of Lundy's assets rather than exculpated him. Petitioner's argument that he might have been able to show a lack of connection with these individuals is speculative. Moreover, petitioner would not have introduced reasonable doubt merely by indicating that the alleged co-conspirators named by Stellato were not prosecuted in connection with this case. The decision not to prosecute these individuals, even if they were, in fact, involved in the crimes alleged in this case, does not,

in any way, refute the direct and circumstantial evidence tying petitioner to these crimes.

Accordingly, for the reasons stated above, petitioner's application for a writ of habeas corpus is denied. The clerk is directed to enter judgment dismissing the petition and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
March 5, 1985

S/Sifton
United States District Judge

Footnotes:

1 Caliari testified for the prosecution and received a conditional discharge upon his plea in this case. Ladone received immunity from prosecution.

2 The "Caliari letter" was found by Lundy's attorney in Lundy's apartment after Lundy's death. A fingerprint analyst testified that she found petitioner's fingerprints on the letter.

3 Petitioner is guilty of conspiracy in the second degree if the crime was forgery in the first degree, and he is guilty of conspiracy in the third degree if he conspired to commit forgery or grand larceny in the second degrees.

4 Walter Lundy and Doll each testified that Lundy specifically mentioned that he was missing Standard Brands stock certificates.